Petition

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No.————

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

F. HARRISON GREEN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TWELFTH APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED

I. Where Petitioner was indicted on two counts of grand theft and, upon a separate trial of one count, he was acquitted because the State's evidence was insufficient as a matter of law, do the collateral estoppel principles embodied in the Fifth Amendment guaranty against double jeopardy preclude a subsequent trial of Petitioner on the remaining count where the same evidence necessary to support that count would have been admissible and sufficient to procure a conviction at the first trial?

II. Where Petitioner was charged, in the First Count of an indictment, with obtaining control over another's bank account by deception and, in the Second Count, with thereafter exerting such control over that account beyond the scope of the owner's consent, does such indictment charge two allied offenses of similar import with a common animus, precluding a separate prosecution on the First Count after an acquittal on the Second Count?

III. Where the First Count of a two-count indictment was dismissed before trial upon Petitioner's motion and, upon trial of the Second Count, a factual issue essential to conviction on the First Count was resolved in favor of the Petitioner, does the fact that the First Count was dismissed at Petitioner's instance deny him the benefits of collateral estoppel and permit his later trial on the First Count after an appellate reversal of the dismissal of that count?

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No.————

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OCTOBER TERM, 1981

F. HARRISON GREEN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TWELFTH APPELLATE DISTRICT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals, Twelth Appellate District of Ohio, entered 22 April, 1981, a motion for leave to appeal having been denied by the Supreme Court of Ohio on 16 September, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for Butler County, Twelfth Appellate District of Ohio, is unreported and is appended as Appendix A. The judgment entries of the Supreme Court of Ohio overruling Petitioner's motion for leave to appeal and dismissing said appeal are appended as Appendix B. The ruling of the Court of Common Pleas of Butler County, Ohio, granting Petitioner's motion for judgment of acquittal, is appended as Appendix C.

JURISDICTION

The judgment entries of the Supreme Court of Ohio denying further appellate review were filed on 16 September, 1981, and this petition is filed within sixty (60) days thereafter, in accord with Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . ."

Ohio Revised Code, Section 2913.02 (A):

> "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:
>
> "(1) * * *
>
> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> "(3) By deception;
>
> "(4) * * *."

Ohio Revised Code, Section 2941.25:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

STATEMENT OF THE CASE AND MANNER OF RAISING FEDERAL QUESTION

In December, 1978, the Butler County, Ohio, Grand Jury indicted the Petitioner on two counts of grand theft. The indictment charged, in the First Count, that the Petitioner, an attorney, obtained or exerted control over a certain joint and survivorship savings account by deception contrary to Ohio Revised Code § 2913.02 (A) (3), in that he led the executrix of the estate of the deceased co-owner of that account to believe that such account was a probate asset of the estate. The Second Count accused the Petitioner of exerting control over that same savings account beyond the scope of the owner's consent in violation of O.R.C. § 2913.02 (A) (2), in that he wrote checks on that account payable to himself. The indictment is set forth in full in Appendix D.

The trial court sustained Petitioner's pre-trial motion to dismiss the First Count on the ground that it failed to charge a crime under Ohio law.

The Petitioner was tried before Hon. Paul E. Riley, sitting by assignment in the Court of Common Pleas of Butler County, Ohio, on the Second Count on 21-22 February, 1979, the Petitioner having waived trial by jury. The State presented extensive testimony and documents which described in detail the circumstances under which the account was included as a probate asset and placed in an estate account and the authority of the Petitioner to write checks thereon. The Petitioner was acquitted, upon motion, at the close of the State's case (Appendix C).

On 30 January, 1980, the Court of Appeals for the First Appellate District of Ohio reversed the dismissal of the First Count of the indictment and remanded that judgment to the trial court for further proceedings. The Petitioner's motion for leave to appeal to the Supreme Court of Ohio was overruled on 1 May, 1980.

On 3 June, 1980, the Petitioner raised the federal question presented in this case by moving the trial court to dismiss the First Count of the indictment on the ground that trial thereunder would place him twice in jeopardy because he had previously been acquitted on the Second Count. That motion and supporting memorandum are appended hereto as Appendix E. The motion was overruled by Hon. Robert H. Gorman, sitting by assignment in the Butler County Common Pleas Court (Appendix F).

The ruling of the trial court was affirmed by the Court of Appeals for Butler County, Twelfth Appellate District of Ohio. The Court of Appeals held that the Petitioner was not twice in jeopardy because the two counts of the indictment constitute separate offenses and for the further reason that Petitioner, by successfully moving to dismiss the First Count, had forfeited his right to double jeopardy protection. The Court of Appeals relied principally upon *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180,

76 L.Ed. 306 (1931) and *Jeffers* v. *United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed. 2d 168 (1977), respectively (Appendix A).

The Supreme Court of Ohio overruled Petitioner's motion for leave to appeal, which asserted error in the judgment of the Court of Appeals on the double jeopardy question. That issue is, therefore, a proper subject for review by this Court on writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. A factual issue essential for conviction on the First Count of the indictment was judicially resolved in Petitioner's favor by the final judgment of acquittal at the prior separate trial of the Second Count. Therefore, trial of the Petitioner on the First Count is precluded by the collateral estoppel principles included in the Fifth Amendment guaranty against double jeopardy.

The Petitioner in this case was acquitted upon trial of the First Count of the indictment because the State of Ohio failed to adduce sufficient evidence to prove guilt beyond a reasonable doubt, not on the basis of some technical rule of criminal procedure. It is well settled that the principles of double jeopardy apply where the court has found the state's evidence to be insufficient as a matter of law. In *Burks* v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978), this United States Supreme Court addressed the question of whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court for lack of sufficient evidence to sustain the jury's verdict. This Court specifically held:

> "The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials."

In *Hudson* v. *Louisiana*, — U.S. —, 101 S.Ct. —, 67 L.Ed. 2d 30 (1981), the defendant, having been convicted of first degree murder by a jury, was granted a new trial by the trial judge on the ground of insufficient evidence. At the second trial, the defendant was again convicted, which conviction was reversed by this Court, which held that the state is precluded from subjecting a defendant to a second trial where the conviction in the prior trial was reversed for lack of sufficient evidence. As in *Burks* and *Hudson*, the Petitioner in this case moved for, and the Court granted, a judgment of acquittal at the end of the State's case, on the grounds that the evidence was insufficient as a matter of law. In granting Petitioner's motion for judgment of acquittal at the close of the State's case, the Court of Common Pleas of Butler County, Ohio, held:

> "* * * In this case, before the defendant can be found guilty of this offense, the State must establish beyond a reasonable doubt that, number one — the defendant knowlingly obtained, or asserted control over property of some value. Two — with the purpose to deprive the owner of such property. And three — without the consent of the owner, or beyond the express or implied consent of the owner, or person authorized to give consent. * * * Now consent may be express or implied. Express consent is determined by the written or spoken word of the person involved. Implied consent is determined by the circumstances which surround those involved, including their words and acts, from which you may infer that consent was given. Now the Court is of the opinion in this case that the State has failed to establish all of these ele-

ments by that degree of proof which is necessary, and there is reasonable doubt existing as a matter of law. * * *"

(Appendix C).

Assuming, *arguendo,* that the two counts of the indictin this case state separate crimes, the Petitioner could only be found to be (a) guilty on both counts, (b) not guilty on both counts, or (c) guilty under the Second Count and not guilty under the First Count. There is no way, however, that the Petitioner could be found not guilty (as he was) under the Second Count (exerting control beyond the scope of the owner's consent) and also guilty of the First Count (obtaining control by deception). The trial court, by resolving in Petitioner's favor the factual issue of the consent of the owner to the Petitioner's exercise of control over the property, necessarily determined in Petitioner's favor the issue raised by the First Count, i.e., whether or not such control was obtained by deception. The State is, therefore, collaterally estopped from trying Petitioner under the First Count.

The doctrine of collateral estoppel prevents the relitigation of factual issues necessarily determined at trial in any subsequent action between the parties wherein the same issue is in question. The decision of fact in the first trial is binding on the subsequent proceedings as though the matter were res judicata. Restatement, Judgments, § 68 (A) (42). Collateral estoppel is also an established rule of criminal law. *U.S.* v. *Oppenheimer,* 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161, 3 L.R.A. 516 (1916). In *U.S.* v. *Carlisi,* 32 F.Supp. 479, 482 (D.C.N.Y., 1940) the court held:

"* * * There is, however, a rule of estoppel in criminal law akin to res judicata. As thus used it is a

'rule of evidence' which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.

"* * *

"To bring himself within the res judicata rule *it is not necessary for the defendant to show that the offense for which he is being tried is identical in law or in fact with the earlier criminal proceeding.* Res judicata usually concerns itself with evidentiary or intermediate facts determined in the prior litigation. It must be noted, however, that the evidentiary or intermediate fact may, in some circumstances, be a complete bar to a second prosecution for another offense. * * * Other examples will be found in the cases hereinafter referred to where the defendant was charged with having committed a single criminal act which resulted in two or more legally distinct crimes and where there has been a trial and acquittal for one of the crimes." (Emphasis added).

Similarly, *U.S.* v. *DeAngelo,* 138 F.2d 466 (CA 3, 1943) presented the question of whether or not the government is estopped from relitigating in a criminal trial facts theretofore materially in issue at a former trial between the same parties for a different criminal offense which resulted in an acquittal. The court held:

"The conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no formal acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all of the judgment determined. Cf. *United States* v. *Adams,* 281 U.S. 202, 205, 50 S.Ct. 269, 74 L.Ed. 807. The matter is one of collateral estoppel of the prosecutor."

In *Ashe* v. *Swenson,* 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970), the United States Supreme Court held that the principle of collateral estoppel is part of the Fifth Amendment guaranty against double jeopardy and that the principle is applicable to the states through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). In *Ashe* the Court defined collateral estoppel: *"It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit"* (emphasis added). The Court further said:

> *"* * * The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality.* Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the Court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'. *The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings'. * * **" (Emphasis added).

In *Sealfon* v. *United States,* 332 U.S. 575, 92 L.Ed. 180 (1948), the Court held that a prior acquittal on a conspiracy charge precluded a subsequent prosecution for the underlying substantive offense because the basic fact in each trial was identical; ". . . the core of the prosecutor's case was in each case the same . . ." The case at bar is merely another attempt by the State to secure a conviction based upon a re-presentation of the same evidence. Among

the facts previously litigated was the Petitioner's authority to act as an agent, and the scope of his authority. To advocate that the trier of fact could have found that the Petitioner acted within the scope of his agency, without determining whether the Petitioner was duly authorized to so act, is to suggest that the trial court did not apply the most basic of agency principles in its analysis of the facts before it. It is basic appellate law that the trial court will be presumed to have understood and correctly applied the law.

The trial court found that the State had failed, as a matter of law, to prove that the Petitioner acted beyond the scope of the owner's consent. Such a conclusion could not have been reached had the owner's consent been soiled by any deception on the part of the Petitioner. *Consent obtained by deception is no consent and confers no authority.*

> "The question of fraud is a question of consent; *if compliance is obtained by deceit or misrepresentations it is not consent,* and the instrument of which the execution is thereby induced is ineffective." *Lore* v. *Truman,* 1 O.Dec.Rep. 510, reversed on other grounds 10 O.St. 45 and 14 O.St. 144 (emphasis added).

The crime charged in the Second Count of the indictment, i.e., that Petitioner obtained or exerted control over the account beyond the scope of the owner's consent, could have been established upon proof that he obtained such control by deception, as there would have been no valid consent, being the fruit of the deception. The evidence necessary for a conviction on the First Count, i.e., that the Petitioner deceived the owner into consenting to his exertion of control over the account, was admissible at trial of the Second Count. *There can be no question that the Petitioner would have been convicted at the trial of the*

Second Count had the evidence convinced the court that he had obtained the owner's consent by deception. The State had a fair opportunity at the first trial to offer whatever proof it could assemble, including proof of deception in obtaining control over the account. As previously noted, *a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first trial is forbidden by the double jeopardy clause. Burks* v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978).

> *"If proof of the matter set out in the second indictment is admissible as evidence under the first indictment, and if a conviction could properly be sustained on such evidence, there is an identity of offenses for double jeopardy purposes." Arnold* v. *United States,* 336 F. 2d 347 (CA 9, 1964) (Emphasis added).

In order to determine the Petitioner's guilt or innocence of the Second Count of the indictment, it was necessary for the trial court to determine whether or not the owner had consented to such exercise of control and whether or not such consent was legitimately obtained. The judgment of acquittal in the trial court necessarily laid to rest, once and for all, the question of deception in obtaining control over the account. The collateral estoppel principles embodied in the constitutional prohibition against double jeopardy proscribe a relitigation of that issue.

The decision of the Ohio Court of Appeals ignored the matter of collateral estoppel and remanded this cause for trial under the First Count of the indictment because the offenses charged in the two counts constitute different crimes and because the First Count was originally dismissed by the trial court upon Petitioner's motion. The stated bases for the Court of Appeals' decision are irrelevant in the light of the collateral estoppel principles set forth above.

The fact remains that a factual issue essential for conviction on the First Count was judicially resolved in Petitioner's favor by a final judgment of acquittal on the Second Court.

The "single rational issue" in dispute at Petitioner's trial was whether he was or was not acting within the scope of his agency at the time the funds were disbursed. The two statutory crimes with which he was charged are distinguishable only in the point of time at which the Petitioner is alleged to have formulated the larcenous intent necessary to support a conviction for grand theft. The Petitioner was originally indicted for (1) having devised a scheme to take his client's property for his own by deception, i.e., operating with a criminal intent from the inception of the agency relationship and, alternatively (2) having obtained control of his client's property lawfully, but subsequently formulating the intent to unjustly alienate it from his client for his own use. Having been acquitted of the latter, he cannot, a fortiori, be guilty of the first offense. *The judgment of acquittal was based on the insufficiency of the evidence as a matter of law as to whether there was any unlawful taking, whether the larcenous intent was formulated before or during Petitioner's agency.* In this regard, the case at bar is indistinguishable from *Brown* v. *Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed. 2d 187 (1977), where a prior conviction for joy-riding precluded the defendant's subsequent prosecution for auto theft. In *Brown,* as in the present case, the crimes charged arose out of a single venture and the distinguishing element was the intent of the defendant at the time he gained control over the property in question. The Supreme Court recognized that *collateral estoppel considerations prohibit consecutive prosecutions even though two separate offenses are involved:*

"The double jeopardy clause of the Fifth Amendment,

> applicable to the states through the Fourteenth, provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb'. *It has long been understood that separate statutory crimes need not be identical — either in constituent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition.* * * *.
>
> "Where successive prosecutions are at stake, the guaranty serves 'a constitutional policy of finality for the defendant's benefit'. *United States* v. *Jorn*, 400 U.S. 407, 479 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe* v. *Swenson*, 397 U.S. 436 (1970); cf. *United States* v. *Martin Linen Supply Co.*, — U.S. — (1977) * * *" (Emphasis added).

The Court of Appeals, in its opinion, cites *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1931), as the source from which ". . . we derive the formula for determining whether or not a trial on the first count is barred by the trial on the second count . . ." (Appendix, A). That "formula", as articulated in *Blockburger* and rigidly applied by the Ohio Twelfth District Court of Appeals in this case, says merely that the test "to determine whether there are two offenses, or only one, is whether each provision requires proof of an additional fact which the other does not".

Blockburger, of course, did not involve a collateral estoppel question, and this Supreme Court of the United States has clearly held that the *Blockburger* "formula" is not the only criterion for determining if a second prosecution is permissible.

In *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 J Ed. 2d 187 (1977), the United States Supreme Court said:

> "The *Blockburger* test is not the only standard for determining whether successive prosecution impermissibly involve the same offense. *Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some instances where the second prosecution requires the relitigation of factual issues already resolved by the first.*" (Emphasis added).

In *Brown,* the U.S. Supreme Court restated its understanding of the double jeopardy clause as set forth in *In Re Nielsen,* 131 U.S. 176, 188 (1889), in which case the court endorsed the rule that

> "Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

As the Petitioner was in jeopardy on the Second of the two counts of the indictment and the evidence necessary to support the First Count would have been sufficient to prove a legal conviction on the Second, the Petitioner's motion to dismiss the First Count on the ground of former jeopardy should have been sustained.

> "Given the requirements for entry of a judgment of acquittal, the purposes of the [Double Jeopardy] Clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple'." *Burks* v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978).

II. The two counts of the indictment charge Petitioner with two allied offenses of similar import with a common animus and his acquittal on one count precludes his later prosecution on the remaining count.

As the Petitioner has been acquitted of the charge of grand theft under the Second Count of the indictment, he may not now be tried on an additional charge of similar import arising out of the same episode.

Such successive prosecutions are proscribed by the double jeopardy provisions of the Fifth Amendment to the U.S. Constitution, the collateral estoppel principles embodied therein and Ohio Revised Code Section 2941.25.

The State has attempted to carve two offenses out of conduct which, in reality, constituted a single, indivisible, transaction or event. For Petitioner to be guilty under the First Count, he had to have the "purpose to deprive" the owner of the money in the account. Merely designating, rightly or wrongly, such account as a probate asset did not and could not have accomplished that purpose — the executrix, by law, had control over the assets of the estate. Assuming, *arguendo,* that the Petitioner had such animus at the time he purportedly led the executrix to believe that the savings account was a probate asset, *the further acts of writing checks could only be the implementation of the original purpose to deprive the owner of her property. The fact that the actual implementation of the original purpose did not take place until two months later cannot make two separate crimes out of one alleged offense.*

It is apparent that the offenses charged in the two separate counts of the indictment are "allied offenses of similar import" and arise out of the same series of events. They are not offenses "committed separately or with separate animus as to each". The defendant could, therefore, be

convicted of only one offense and, having been acquitted in the first trial, he has already suffered the maximum exposure which the law allows.

In any event, as previously noted, even if one assumes that the indictment charged two separate crimes, the only relevant difference between the two is the point of time at which the Petitioner allegedly formulated the animus necessary to support a conviction of grand theft. *Petitioner was acquitted of the legal insufficiency of the State's evidence to prove an unlawful taking and, therefore, there is no question of larcenous intent, whether developed prior to or during Petitioner's agency.*

III. The Petitioner, by moving to dismiss the First Count on the ground that it did not charge a crime under Ohio law, did not thereby waive or forfeit his Fifth Amendment right to double jeopardy protection. A factual issue essential to conviction under the First Count having been resolved in Petitioner's favor at the trial of the Second Count, the State is collaterally estopped from trying Petitioner on the First Count after an appellate reversal of the trial court's dismissal of that Count.

The Opinion of the Ohio Court of Appeals states:

> "We feel compelled to point out that even if appellant was correct in his contention that the two counts set forth in his indictment were two allied offenses with a common animus, he could not avoid a trial on the first count.
>
> "After all, the appellant by his own acts, set the stage for this sequence of events. He filed the pretrial motion to dismiss Count One of the indictment. That

> motion was sustained by the trial court after which appellee appealed." (Appendix A).

The position of the Court of Appeals is, apparently, that because Petitioner, before trial, successfully moved for the dismissal of the First Count of the indictment, he thereby forfeited his constitutional right to the protection of the collateral estoppel principles embodied in the Fifth Amendment. That protection arose when a factual issue essential to conviction on the First Count (i.e., whether Petitioner obtained control over the account by deception) was subsequently judicially resolved in his favor at trial of the Second Count.

Green v. *United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199, 61 A.L.R. 2d 1119 (1957), presented a similar situation. Defendant in that case had been tried for first degree murder and convicted by a jury of second degree murder. The Court of Appeals reversed and remanded the case because the verdict was not supported by the evidence. The defendant was retried and convicted of first degree murder. On appeal on grounds of double jeopardy the Government contended that, by appealing his second degree murder conviction, the defendant surrendered his defense of double jeopardy. The U.S. Supreme Court rejected the Government's contention, holding that a defendant's right to challenge the legality of the proceedings against him is not conditioned upon his waiving his other rights which are so important as to be saved by an express clause in the Constitution of the United States:

> "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."

Burks v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978), followed *Green*:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."

While in the case at bar the trial court acquitted the Petitioner on the ground of insufficient evidence, there is no pertinent distinction to be drawn from *Green* and *Burks* wherein such legal insufficiency was the basis for an appellate reversal.

No question relating to double jeopardy is presented merely because the First Count was dismissed on the Petitioner's motion. The Petitioner had the right to challenge the legal sufficiency of the indictment and he did not, merely by availing himself of that right, forfeit, relinquish, waive or diminish any constitutional protection to which he was entitled.

In *Jeffers* v. *United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed. 2d 168 (1977), relied upon by the Ohio Court of Appeals in this regard, the defendant was charged under two separate indictments, one of which charged a crime which was a lesser included offense to the crime charged in the other indictment. Defendant requested and was granted separate trials. Defendant was *convicted* on the lesser included offense and the court held that he could subsequently be tried on the greater offense inasmuch as he had, by his request for separate trials, waived the protection of the double jeopardy clause. In the case *sub judice,* of course, defendant did not request separate trials; the First Count was dismissed upon defendant's motion on the ground that the same did not charge a crime under the laws of this State. The important distinction, how-

ever, is the fact that in *Jeffers* the defendant was convicted on the first trial and that, therefore, no collateral estoppel arose in his favor. There can be no question that, had the defendant in *Jeffers* been acquitted of the lesser offense, prosecution of the greater offense would have been barred by the collateral estoppel provisions embodied in the Fifth Amendment prohibition against double jeopardy, as set forth in *Ashe* v. *Swenson, Brown* v. *Ohio,* and the other cases herein cited.

The Respondent, State of Ohio, in its memoranda filed below, has also failed to address the issue of collateral estoppel. In support of its contention that Petitioner forfeited his Fifth Amendment protection against double jeopardy because he challenged the legal sufficiency of the First Count of the indictment, Respondent cited *Jeffers* v. *United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168; *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306; *Serfass* v. *United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 and *United States* v. *Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65. *In none of said cases had a factual issue essential to conviction at the second trial been resolved at the first trial in favor of the defendant.* Therefore, no question of collateral estoppel arose.

The collateral estoppel protection afforded Petitioner by his acquittal was not negated by the appellate reversal of the dismissal of the First Count; that protection arose independently of the proceedings pertaining to the dismissal of the First Count. There was no relationship whatever between the dismissal of the First and the judicial resolution of factual issues at the trial of the Second Count.

CONCLUSION

The Petitioner's position on the question of collateral estoppel may be stated as a proposition of law, viz.:

> Where a defendant is indicted for two offenses, the collateral estoppel principles embodied in the Fifth Amendment guaranty against double jeopardy prohibit the trial of the defendant for either offense *where conviction thereof would be inconsistent with the defendant's prior acquittal of the other offense.*

In this case, the "single rational issue" in dispute under the First Count is whether the Petitioner obtained control over the account by deception. The trial court acquitted the Petitioner on the Second Count because the State failed as a matter of law to prove that the Petitioner acted beyond the scope of the owner's consent in writing checks against the account. The Petitioner could not have been acquitted on the Second Count if the owner's consent had been obtained by deception. The controlling factual issue presented by the First Count was resolved by the final judgment of acquittal on the Second Count.

Conviction on the First Count of the indictment would be inconsistent with the Petitioner's prior acquittal on the Second Count. The State is collaterally estopped from relitigating factual issues resolved in Petitioner's favor at the first trial.

The State, having failed to prove deception at the first trial (and proof of deception would necessarily have resulted in conviction), is not entitled to another shot at the Petitioner on that issue.

> "The Fifth Amendment's guaranty against double jeopardy, as made applicable to the states by the Four-

> teenth Amendment, forbids a state to treat a first trial, at which the defendant is acquitted, as no more than a 'dry run' for a second prosecution." *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970)

* * *

The indictment in this case purports to create two separate offenses out of a single, indivisible course of conduct committed for a single purpose. If a *mens rea* is assumed in connection with Petitioner's acquisition of control over the account in question, it is meaningless without a co-existing intent to exercise that control. The Petitioner actually exercised that control by writing checks against that account and was exonerated of the charge that such conduct exceeded the scope of the owner's consent.

The obtaining of control and the subsequent exercise thereof were parts of the same conduct and were the product of a single animus and the Petitioner's acquittal on the Second Count bars a subsequent prosecution on the First Count.

* * *

There is no relationship between the Petitioner's challenge of the legal sufficiency of the First Count and the collateral estoppel which later arose in his favor. That estoppel arose by virtue of a final judgment of acquittal which resolved a factual issue essential to conviction on the First Count. The fact that the First Count was originally dismissed on Petitioner's motion and that such dismissal was subsequently reversed on appeal, cannot affect the finality of the judgment from which the estoppel stems.

The collateral estoppel principles embodied in the Fifth

Amendment guaranty against double jeopardy preclude trial of the Petitioner on the First Count of the indictment.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

CASE NO. CA 80-08-0091

STATE OF OHIO,

Plaintiff-Appellee,

vs.

F. HARRISON GREEN,

Defendant-Appellant.

MEMORANDUM DECISION AND JUDGMENT ENTRY

(Filed April 22, 1981)

Mr. John F. Holcomb, Prosecuting Attorney for Butler County, Butler County Courthouse, Hamilton, Ohio 45011, for Plaintiff-Appellee.

Mr. George H. Elliott, 406 First National Bank Building, Middletown, Ohio 45042, for Defendant-Appellant.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers

from the Court of Common Pleas of Butler County, transcript of proceedings, briefs and oral arguments of counsel.

Now therefore, the assignments of error having been considered, are passed upon in conformity with App. R. 12 (A) as follows:

The appellant was indicted in November, 1978, for two counts of grand theft. That portion of the indictment describing the charges against appellant reads as follows:

FIRST COUNT

That on or about the 29th day of June, 1976, at Butler County, Ohio, F. Harrison Green did, with purpose to deprive the owner of property, knowingly obtain or exert control over said property by deception in that he led Helen M. Epperson to believe that a certain savings account in the amount of $15,457.98 in the names of Edward L. Epperson, Sr., or Helen Marie Epperson was part of the probate assets and estate of Edward L. Epperson, Sr., who had deceased shortly prior thereto, when in fact the said F. Harrison Green well knew that said savings account was a survivorship account and as such was neither a probate asset nor part of the estate of the late Edward L. Epperson, Sr., which offense is a felony of the fourth degree, in violation of the Ohio Revised Code, Title Grand Theft, Section 2913.02 (A) (3), and against the peace and dignity of the State of Ohio, and that

SECOND COUNT

From on or about the 16th day of August, 1976, through on or about the 22nd day of June, 1977, at Butler County, Ohio, F. Harrison Green did, with purpose to deprive the owner of property, to-wit: $9,000, knowingly obtain or exert control over said property beyond the scope of the express or implied consent of the owner or person authorized to give con-

> sent, to-wit: Helen M. Epperson or Helen M. Epperson, Executrix, in that he did draw checks from the funds of Helen M. Epperson which were in an account he had induced her to establish under the style of the Estate of Edward L. Epperson, Sr., said checks being made payable to himself as follows: $1,500 on or about August 16, 1976; $1,000 on or about September 17, 1976; $1,000 on or about October 6, 1976; $1,000 on or about November 5, 1976; $1,000 on or about November 14, 1976; $500 on or about December 7, 1976; $2,000 on or about December 27, 1976; and $1,000 on or about June 22, 1977, which offense is a felony of the fourth degree.

On January 22, 1979, appellant filed a motion to dismiss which read as follows:

> 1. Defendant, by his attorneys, respectfully moves the Court to dismiss the first count of the indictment for the reason that the same fails to state or charge an offense under the laws of this state.
>
> 2. Defendant further moves the Court to dismiss the second count of the indictment because the same fails to charge an offense under Ohio law and the same is drawn in such vague and ambiguous language that defendant cannot properly defend himself nor could he plead double jeopardy to subsequent prosecution on the same charge.

The court sustained the motion as to the first count and overruled the motion as to the second count. The appellant was tried on the second count and at the conclusion of the state's evidence, the court sustained a motion to dismiss.

The appellee appealed the ruling of the trial court which sustained appellant's motion to dismiss Count One. (Appellee attempted to appeal the action of the trial court

on the second count, but was not permitted to do so.) This appeal was heard by the First District Court of Appeals which reversed the decision of the trial court and ordered that the appellant be tried on the charge in Count One of the indictment.

The appellant then filed a motion in the trial court asking that the charges in Count One of the indictment be dismissed for the reason that the indictment charged two allied offenses of similar import with a common animus. The appellant argued further that because of this it followed that prosecution under the first count is barred by the acquittal under the second count; and that by the acquittal of the appellant on the second count the collateral estoppel principles embodied in the Fifth Amendment guaranty against double jeopardy prohibit a subsequent trial on the first count. (We note, however, that this appears to be in conflict with what appellant said in the second paragraph of his pretrial motion.) The trial court overruled the motion; and it is from that ruling that appellant appeals.

Appellant's sole assignment of error is as follows:

> The trial court erred in overruling defendant's motion to dismiss the first count of the indictment.

Ohio has provided by statute the maner in which the trial courts shall proceed on multiple counts in an indictment. R.C. 2941.25 reads as follows:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where

> his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

The question at this point is whether paragraph (A), or paragraph (B), of R.C. 2941.25 governs; and by what formula the determination can be made.

From the case of *Blockburger* v. *U.S.* (1931), 284 U.S. 299, 52 S.Ct. 180, we derive the formula for determining whether or not a trial on the first count is barred by the trial on the second count. In that case the U.S. Supreme Court said:

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses, or only one, is whether each provision requires proof of an additional fact which the other does not.

Id. at 304, 52 S.Ct. at 185.

Prior to the decisions of the United States Supreme Court in the case of *Blockburger* v. *U. S., supra,* the Supreme Court of Ohio said in *Duvall* v. *State* (1924), 111 Ohio St. 657, 146 N.E. 90:

> It is therefore our conclusion that not only the rule as announced in Ohio but the cases above cited from other jurisdictions sustain the proposition that when the same facts constitute two or more offenses, and the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, the first prosecution will not be a bar to the second, although the offenses were *committed at the same time and by the same act.*

Id. at 666, 146 N.E. at 92. (Emphasis added.)

The recent case of *State* v. *Best* (1975), 42 Ohio St. 2d 350, 330 N.E.2d 421, refines the rule set forth in *Blockburger* and *Duvall,* citing both with approval. In that case, the defendant was indicted and charged with a violation of former R.C. 4511.18.1 which provided that:

> No person shall unlawfully and intentionally cause the death of another while violating R.C. 4511.19, 4511.20, 4511.20.1, or 4511.25.1. Any person violating this section is guilty of homicide by vehicle in the first degree.

The indictment stated that the defendant had violated R.C. 4511.19 by operating a motor vehicle within the state while under the influence of alcohol. Defendant entered a guilty plea and was convicted. The defendant was also charged with violating two municipal ordinances, operating a motor vehicle while under the influence of alcohol and failure to stop within an assured clear distance.

The court in that case found that a violation of the municipal ordinance which prohibits the operation of a motor vehicle while under the influence of alcohol would necessarily be a violation of R.C. 4511.19. The court then concluded that to be convicted of former section 4511.18.1, defendant would have had to be convicted of the lesser included offense set out in R.C. 4511.19. Therefore, the court concluded that the conviction under former R.C. 4511.18.1 was a bar to the charge of operating a motor vehicle while under the influence of alcohol as set forth in the municipal ordinance. However, the court found that assured clear distance was not related to the offense set forth in former R.C. 4511.18.1. Therefore, a conviction under former R.C. 4511.18.1 was not a bar to conviction for this offense. The court quoted from *State* v. *Mitchell* (1884), 42 Ohio St. 383:

> That if, in fact, the same identical act had been charged sucessively in two valid indictments, upon one of which the prisoner had been in jeopardy by a trial, and the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction on the first, the plea of former jeopardy will be sustained to the last indictment, *and otherwise not.*

Id. at 535. (Emphasis added.)

Further, the court quoted with approval from *Morey* v. *Commonwealth,* 108 Mass. 433 as follows:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

State v. *Best,* 42 Ohio St. 2d at 534, 330 N.E.2d at 424.

In the case *sub judice,* appellant was indicted and charged with two counts, as set out above, under the same statute but each count was based on a separate subparagraph of that statute, i.e., R.C. 2913.02 (A) (3) and R.C. 2913.02 (A) (2).

Appellant was acquitted under R.C. 2913.02 (A) (2) in the trial on Count Two. Appellant now stands for trial under R.C. 2913.02 (A) (3), but pleads double jeopardy as a bar to this prosecution. The question is then, whether "each provision requires proof of an additional fact which the other does not." *Blockburger, supra; State* v. *Best, supra.* In the application of this principle to the case before us, we make the following observations, to wit:

In the prosecution under R.C. 2913.02 (A) (2), the State had to prove that appellant:

1. Knowingly obtained or exerted control over property of another;
2. With purpose to deprive the owner of that property; and,
3. Beyond the scope of express or implied consent of the owner or person authorized to give consent.

The trial court found that the State failed to meet the required burden of proof as to these elements.

In prosecution under R.C. 2913.02 (A) (3), the State must prove that appellant:

1. By deception;
2. Knowingly obtained or exerted control over property of another; and,
3. With purpose to deprive the owner of that property.

Applying the test from *Mitchell, supra,* as cited with approval in *Best, supra,* this court finds that the evidence necessary to sustain the conviction under R.C. 2913.02 (A) (3) is not sufficient to meet the requirements of R.C. 2913.02 (A) (2). Therefore, the court finds that the dismissal of the charges contained in the second count is not a bar to prosecution of the charges contained in the first count.

We feel compelled to point out that even if appellant was correct in his contention that the two counts set forth in his indictment were two allied offenses with a common animus, he could not avoid a trial on the first count.

After all, the appellant by his own acts, set the stage for this sequence of events. He filed the pretrial motion to dismiss Count One of the indictment. That motion was sustained by the trial court after which appellee appealed.

In response to such action by the appellant in *Jeffers* v. *U. S.* (1977), 432 U.S. 137, 97 S.Ct. 2207; the United States Supreme Court said:

> Both the trial after the appeal and the trial after the mistrial are, in a sense, a second prosecution for the same offense, but, in both situations, the policy behind the Double Jeopardy Clause does not require prohibition of the second trial.

Id. at 152, 97 S.Ct. at 2226.

In that case, the defendant had, at his request, been granted separate trials on separate counts of an indictment. The Court said that defendant's action had "deprived him of any right that he might have had against consecutive trials." *Id.* at 154, 97 S.Ct. at 2228.

That same principle is applicable regardless of whether there is a request for separate trials as in *Jeffers* v. *U.S., supra,* or whether a count of the indictment is dismissed pursuant to a pretrial motion as in the case *sub judice.* Therefore, appellant's sole assignment of error is not well taken. The judgment of the trial court is affirmed and this cause is remanded to the Court of Common Pleas of Butler County for such further proceedings as are consistent with this decision.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

CASTLE, P.J., HENDRICKSON AND KOEHLER, J.J.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

No. 81-935

THE STATE OF OHIO,) 1981 TERM
City of Columbus.) To wit: September 16, 1981

STATE OF OHIO,

Appellee,

vs.

F. HARRISON GREEN,

Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR BUTLER COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Rathman, Elliott & Boyd.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19..
..... Clerk
..... Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

No. 81-935

THE STATE OF OHIO,) 1981 TERM
City of Columbus.) To wit: September 16, 1981

STATE OF OHIO,

Appellee,

vs.

F. HARRISON GREEN,

Appellant.

APPEAL FROM THE COURT OF APPEALS FOR BUTLER COUNTY

This cause, here on appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19..
..... Clerk
..... Deputy

APPENDIX C

RULING OF THE COURT OF COMMON PLEAS, BUTLER COUNTY, OHIO

BY THE COURT: First of all we need to remind ourselves in the beginning, really the purpose for which we are here. Now this Defendant stands charged with, and had been put to trial for the offense of grand theft, which is a felony of the fourth degree. We're not here to consider if he has violated any of the canons of ethics, if he is guilty of poor judgment, or is a poor legal practitioner, or if he has breached any fiduciary duty. A pertinent question at this point in the trial is whether or not the State of Ohio has established his guilt to all of the elements of the offense charged beyond a reasonable doubt. If they have, then the Defendant is put to the presentation of his defense. If not, then he is entitled to a directed verdict of acquittal. More simply put – is he guilty of a crime? The Prosecution has accurately and correctly set forth the proper elements of the crime, together with the statutory definitions in his memorandum to the Court. In this case, before the Defendant can be found guilty of this offense, the State must establish beyond a reasonable doubt that, number one – the Defendant knowingly obtained, or asserted control over property of some value. Two – with the purpose to deprive the owner of such property. And three – without the consent of the owner, or beyond the express or implied consent of the owner, or person authorized to give consent. Now the statutory definition of deprived says that 'deprived' means, number one – to withhold property of another permanently, or for such period as to appropriate a sub-

stantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration. Number two – dispose of property so as to make it unlikely that the owner will recover it. Number three – to accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return therefor, and without reasonable justification or excuse for not giving proper consideration. Now consent may be express or implied. Express consent is determined by the written or spoken word of the person involved. Implied consent is determined by the circumstances which surround those involved, including their words and acts, from which you may infer that consent was given. Now the Court is of the opinion in this case that the State has failed to establish all of these elements by that degree of proof which is necessary, and there is reasonable doubt existing as a matter of law. Cases such as this are deplorable because they tend to bring in the entire legal profession in disrepute, and they tend to increase an already existing distrust which the public generally has for the profession. By entering this finding, the Court does not intend to indicate any mark of approval or condonation of any of the Defendant's actions, but the Court says simply, that in the opinion of this Court, by the evidence offered and presented, it does not constitute a criminal offense under the laws of the State of Ohio. Now the Court thinks first of all that the Prosecutor and his staff is to be commended for the job they have done in presenting this case. It's not easy at all to take a case against a fellow practitioner to trial. I think he is to be commended for it. Mr. Elliott is to be commended for his defense. But again, it's not an easy thing to become involved in with a fellow practitioner. Now the Court would recommend that a copy of this finding be provided

to the Grievance Committee of Butler County Bar Association, and that the matter be referred to them for further investigation and appropriate action as their findings may indicate. The defendant will be released, and his bondsman is released.

ALL PARTIES THANK THE COURT.
AND COURT IS ADJOURNED.

* * *

APPENDIX D

INDICTMENT

THE STATE OF OHIO)
) SS.
BUTLER COUNTY)

COURT OF COMMON PLEAS

Of the Term September in the year one thousand nine hundred and seventy-eight

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 29th day of June, 1976, at Butler County, Ohio, F. Harrison Green did,

FIRST COUNT

with purpose to deprive the owner of property, knowingly obtain or exert control over said property by deception in that he led Helen M. Epperson to believe that a certain savings account in the amount of $15,457.98 in the names of Edward L. Epperson, Sr., or Helen Marie Epperson was part of the probate assets and estate of Edward L. Epperson, Sr., who had deceased shortly prior thereto, when in fact the said F. Harrison Green well knew that said savings account was a survivorship account and as such was neither a probate asset nor part of the estate of the late Edward L. Epperson, Sr., which offense is a felony of the fourth degree, in violation of the Ohio Revised Code, Title Grand Theft, Section 2913.02 (A) (3), and against the peace and dignity of the State of Ohio, and that

SECOND COUNT

From on or about the 16th day of August, 1976, through on or about the 22nd day of June, 1977, at Butler County, Ohio, F. Harrison Green did, with purpose to deprive the owner of property, to-wit: $9,000, knowingly obtain or exert control over said property beyond the scope of the express or implied consent of the owner or person authorized to give consent, to-wit: Helen M. Epperson or Helen M. Epperson, Executrix, in that he did draw checks from the funds of Helen M. Epperson which were in an account he had induced her to establish under the style of the Estate of Edward L. Epperson, Sr., said checks being made payable to himself as follows: $1,500 on or about August 16, 1976; $1,000 on or about September 17, 1976; $1,000 on or about October 6, 1976; $1,000 on or about November 5, 1976; $1,000 on or about November 14, 1976; $500 on or about December 7, 1976; $2,000 on or about December 27, 1976; and $1,000 on or about June 22, 1977, which offense is a felony of the fourth degree,

in violation of the Ohio Revised Code, Title Grand Theft, Section 2913.02 (A) (2), and against the peace and dignity of the State of Ohio.

/s/ John F. Holcomb
Prosecuting Attorney

APPENDIX E

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

NO. CR 78-12-0572

STATE OF OHIO,

Plaintiff,

vs.

F. HARRISON GREEN,

Defendant.

MOTION TO DISMISS INDICTMENT

(Filed June 3, 1980)

---

1. Defendant, having been charged in the First Count of an indictment returned on 8 December, 1978, with grand theft under Revised Code Section 2913.02 (A) (3), moves the Court for an order dismissing said First Count of said indictment which has placed him in double jeopardy for the reason that heretofore, on 21 February, 1979, he was prosecuted in this case for the charges set forth in the Second Count of said indictment, viz.: grand theft under

Revised Code Section 2913.02 (A) (2) at which trial he was, on 22 February, 1979, acquitted.

RATHMAN, ELLIOTT, BOYD & VALEN

BY: .....
GEO. H. ELLIOTT
406 First National Bank Building
Middletown, Ohio 45042
(513) 424-1669

ATTORNEYS FOR DEFENDANT

MEMORANDUM

The indictment against the defendant, returned 8 December, 1978, alleged, in the First Count, that the defendant obtained or exerted control over a certain savings account by deception and, in the Second Count, that the defendant obtained or exerted control over said savings account beyond the scope of the owner's consent. A copy of said indictment is attached hereto.

The Hon. Paul Riley, sitting by assignment in Butler County, granted defendant's motion to dismiss the First Count of the indictment on the ground that the same failed to charge a crime under the laws of Ohio. The case went to trial before the Court on 21 February, 1979 and, on 22 February, 1979, after the State had rested, Judge Riley granted defendant's motion for a judgment of acquittal.

The dismissal of the First Count of the indictment was reversed on appeal and the State now seeks to try the defendant on that charge.

As the defendant has been acquitted of the charge of grand theft under the Second Count of the indictment, he may not now be tried on an additional charge of similar import arising out of the same episode.

Such successive prosecutions are proscribed by the double jeopardy provisions of the Fifth Amendment to the U.S. Constitution, the collateral estoppel principles embodied therein and Revised Code Section 2941.25.

Revised Code Section 2941.25 provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

It is apparent that the offenses charged in the two separate counts of the indictment are "allied offenses of similar import" and arise out of the same series of events. They are not offenses "committed separately or with separate animus as to each". Defendant could, therefore, be convicted of only one offense and, having been acquitted in the first trial, he has already suffered the maximum exposure which the law allows. As defendant may only be convicted on one charge, his acquittal on one charge must constitute a bar to a subsequent prosecution on a virtually identical charge.

Both counts of the indictment deal with the same allegedly criminal event, i.e., the acquisition and exertion of control by the defendant over the account in question. There is no dispute that the defendant wrote checks against the account, as set forth in the Second Count of the indictment, and the matter of how defendant obtained such control was fully litigated in the first trial.

Where the same evidence which is necessary to support the second indictment would have been admissible and sufficient to procure a conviction upon the first, a prima facie case of double jeopardy exists. *Bainbridge* v. *State*, 30 O.St. 264 (1876).

In *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970), the U.S. Supreme Court held that the principle of collateral estoppel is part of the Fifth Amendment guarantee against double jeopardy and that the principle is applicable to the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). In *Ashe* the Court defined collateral estoppel: "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit". The Court further said:

> "* * * The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to

> foreclose from consideration'. The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings'. * * *"

State v. *Thomas,* 61 O.St. 2d 254, Ohio Bar 25 February, 1980; *State* v. *Donald,* 57 O.St. 2d 73, 11 O.Ops. 3d 242 (1979); *State, ex rel. Russell* v. *Perkins, et al.,* 34 O.St. 2d 48, 63 O.Ops. 2d 85 (1973); *State, ex rel. Owens* v. *Campbell,* 27 O.St. 2d 264, 56 O.Ops. 2d 158 (1971); *State, ex rel., Susi* v. *Flowers,* 43 O.St. 2d 11, 72 O.Ops. 2d 6 (1975).

The First Count of the indictment requires proof of an essential element of the Second Count of which defendant has been acquitted, i.e., the wrongful acquisition and assertion of control by the defendant over the decedent's bank account. The manner and means by which the defendant obtained and exerted control over the account were the subjects of extensive testimony in the first trial (R. pp. 39-102). There is nothing in the record which indicates that the defendant at any time misled the owner of the account or misrepresented anything to her or committed any fraudulent or deceitful act which induced her to authorize him to exercise any control over the account. *The subject of the defendant's alleged deceit was thoroughly litigated at the first trial and the Court, after consideration of such testimony, found that the State had failed to prove that the defendant acted beyond the scope of the owner's consent.*

Such a conclusion could not have been reached by the Court had the owner's consent been soiled by any deception on the part of the defendant. Consent obtained by deception is no consent and confers no authority.

"The question of fraud is a question of consent; if

> compliance is obtained by deceit or misrepresentations it is not consent, and the instrument of which the execution is thereby induced is ineffective." *Lore* v. *Truman,* 1 O.Dec.Rep. 510, reversed on other grounds 10 O.St. 45 and 14 O.St. 144.

If the defendant obtained or exerted any control over decedent's account by misleading the owner into including it as a probate asset, then his subsequent exertion of control could not have been within the scope of the owner's consent, as such consent would have been tainted by the deception and the defendant would have been convicted on the Second Count.

The crime alleged in the Second Count, i.e., that defendant obtained or exerted control over the account beyond the scope of the owner's consent, could have been established upon proof that he obtained such control by deception, as there would have been no valid consent, being the product of the deception. Thus, *the acquittal can be explained only as a determination that the defendant did not obtain or exert control by deception and such a determination is inconsistent with a finding of guilty on the First Count.*

Hence the "single rational issue" in dispute under the First Count is whether the defendant obtained control by deception and the Court necessarily found that he had not. The prior determination concerning that issue bars relitigation of that issue on the principle of collateral estoppel embodied in the prohibition against double jeopardy. *Ashe* v. *Swenson,* supra.

The State, having failed to prove deception at the first trial, is not entitled to another shot at the defendant.

"The Fifth Amendment's guarantee against double

jeopardy, as made applicable to the states by the Fourteenth Amendment, forbids a state to treat a first trial, at which the defendant is acquitted, as no more than a 'dry run' for a second prosecution." *Ashe* v. *Swenson,* supra.

Respectfully submitted,

RATHMAN, ELLIOTT, BOYD & VALEN

BY: .....

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[CERTIFICATE OF SERVICE OMITTED]

APPENDIX F

STATE OF OHIO
COUNTY OF BUTLER
COURT OF COMMON PLEAS

Case No. CR78-12-0572

STATE OF OHIO,

Plaintiff,

vs.

F. HARRISON GREEN,

Defendant.

JUDGMENT ENTRY

This 30th day of June, 1980, this cause came on to be heard upon the motion of the defendant to dismiss the First Count of the Indictment herein, on the ground that he would be held twice in jeopardy; and the Court, having due consideration to the memoranda and arguments of counsel and the law, finds that the defendant's motion is not well taken.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant's motion to dismiss is hereby overruled.

Defendant excepts. ENTER

.....

ROBERT H. GORMAN, JUDGE
SITTING BY ASSIGNMENT

APPROVED AS TO FORM:

/s/ JOHN F. HOLCOMB
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

.....

GEORGE H. ELLIOTT
ATTORNEY FOR DEFENDANT

Opposition

Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-933

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

F. HARRISON GREEN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TWELFTH APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED

I. Whether the Double Jeopardy Clause is not offended where a defendant, by his own pretrial motion to dismiss, deliberately terminates prosecution on the first count of an indictment without submission to a judge or jury as to his guilt or innocence and causes a trial to be had on the second count alone resulting in an acquittal, and thereafter the state successfully appeals from the motion to dismiss and obtains a reversal for further proceedings on the first count.

II. Whether the decision below is neither in conflict with any applicable decision of this Court, nor in conflict with the decision of another state court of last resort or of a federal court of appeals.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-933

F. HARRISON GREEN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TWELFTH APPELLATE DISTRICT OF OHIO

STATEMENT OF THE CASE

In December, 1978, petitioner F. Harrison Green was indicted on two counts of Grand Theft, the first count alleging theft by deception of $15,457.98 on June 29, 1976, contrary to Ohio Rev. Code § 2913.02 (A) (3); the second count alleged an embezzlement of the sum of $9,000.00 in eight separate checks drawn to himself between August 16, 1976 through June 22, 1977, contrary to Ohio Rev. Code § 2913.02 (A) (2).

Upon a pretrial defense motion to dismiss the first count on the basis that it failed to state a criminal offense, the trial court dismissed the first count of the indictment on February 6, 1979. Trial was had on February 21-22, 1979, to the Court without a jury, upon the second count alone; and on February 22, the court sustained a motion for acquittal as the end of the State's case.

However, pursuant to Section 2945.67 (A), Ohio Revised Code, appeal was made from the judgment dismissing the first count of the indictment, and on January 20, 1980, the Court of Appeals for Butler County, First Appellate District of Ohio, reversed and remanded the cause for further proceedings. (Case No. CA79-03-0023) The Supreme Court of Ohio overruled petitioner's motion for leave to appeal on May 1, 1980. (Case No. 80-409)

Thereafter, on June 30, 1980, the trial court heard and overruled Petitioner Green's motion to dismiss the first count of the indictment on the grounds of former jeopardy. That judgment, entered on July 16, 1980, was affirmed on appeal in the Court of Appeals for Butler County, Twelfth Appellate District of Ohio on April 22, 1981. A motion for leave to appeal was overruled in the Supreme Court of Ohio on September 16, 1981. (Case No. 81-935)

The petition for writ of certiorari was timely filed in this Court on November 13, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Double Jeopardy Clause is not offended where a defendant, by his own pretrial motion to dismiss, deliberately terminates prosecution on the first count of an indictment without submission to a judge or jury as to his guilt or innocence and causes a trial to be had on the second count alone resulting in an acquittal, and thereafter the state successfully appeals from the motion to dismiss and obtains a reversal for further proceedings on the first count.

The renewed prosecution on this charge, after the interruption occasioned by the defendant's motion, is not contrary to the Double Jeopardy Clause of the Fifth Amendment according to the significant cases concerning appeals by the prosecution and the issue of double jeopardy, recently decided in the United States Supreme Court and directly related to the issue now before the Court.

In *Serfass* v. *United States,* 420 U.S. 377, 43 L.Ed. 2d 264, 95 S. Ct. 1055 (1975), it was held that where a defendant moves to dismiss an indictment and obtains a pretrial order of dismissal based upon a legal ruling, the Double Jeopardy Clause would not bar an appeal or subsequent renewed prosecution by the government, since jeopardy had not attached and defendant, by his own action, had not been put to trial before the trier of facts.

Further, in *United States* v. *Scott,* 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978), where a defendant was charged in a three-count narcotics indictment and made pretrial and midtrial motions to dismiss two of its counts, the trial court granted the motions and the defendant was found not guilty on the third count by jury verdict. The prosecution appealed from the midtrial termination of the

first two counts, and the Supreme Court held under these circumstances that governmental appeal and reprosecution of a defendant who has successfully obtained a termination of trial in his favor, before any determination of fact and on grounds unrelated to his guilt or innocence, does not invade any interest protected by the Double Jeopardy Clause. *Id.* 437 U.S. at 100. In explaining its decision, the Court reasoned, (in logic equally applicable to Petitioner Green),

> [T]he Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. *Id.*, 437 U.S. at 96.

Also, in *Scott* as in the petition at bar, the petitioner argued that he had the right to challenge the legal sufficiency of the indictment and that he did not, merely by availing himself of that right, forfeit, relinquish or waive his constitutional protection as to double jeopardy. The *Scott* Court rejected this argument, and explained:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is ac-

> cused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. *We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in Green. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. Id.,* 437 U.S. at 98-99, (Emphasis added).

Finally and most applicable to the case at bar is *Jeffers* v. *United States,* 432 U.S. 137, 53 L. Ed. 2d 168, 97 S. Ct. 2207 (1977), where the defendant was charged in two indictments with conspiracy to distribute heroin and cocaine, 21 U.S.C. § 846, and "continuing criminal enterprise," 21 U.S.C. § 848, arising out of the same course of criminal conduct. The defendant had successfully opposed the prosecution's motion to try both indictments in the same case; the defendant was first tried and convicted of the conspiracy charge, and thereafter he filed a motion to dismiss the second indictment under the theory of double jeopardy, arguing that the two indictments arose out of the same transaction, that the "same evidence" rule of *Blockburger* v. *United States,* 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), was applicable, and that trial of the lesser included offense, § 846 conspiracy, barred trial of the greater offense, § 848 criminal enterprise.

In *Jeffers* the Supreme Court assumed, *arguendo,* that the conspiracy charge was a lesser-included offense to the charge of continuing criminal enterprise, and that ordinarily a prosecution on a lesser-included offense would bar a subsequent prosecution for the greater offense. (*See Brown* v. *Ohio,* 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977), decided simultaneously with *Jeffers.*) How-

ever, the Court noted exceptions to this rule, and under circumstances where the defendant was "solely responsible for the successive prosecutions," the Court held that "his action deprived him of any right he might have had against consecutive trials," *Jeffers, id.* at 154; it was therefore concluded,

> [T]here is no violation of the Double Jeopardy Clause when [a defendant] elects to have the two offenses tried separately and persuades the trial court to honor his election. *Id.* at 152.

Applying these decisions to the instant case, it is clear that petitioner Green, by his pretrial motion to dismiss, chose to terminate prosecution of the first count of the indictment without submission to the trier of fact as to his guilt or innocence of the charge that on June 29, 1976, he obtained control of a $15,000 savings account of Helen Epperson by deception with purpose to deprive the owner of the property. His guilt or innocence as to this transaction, subsequently ruled by the Ohio Appellate Court to correctly state a criminal offense, was by reason of Green's action *not* at issue in the trial upon the second count of the indictment; he persuaded the trial court that it *could not* consider the first count as a criminal act, and it follows that there was no adjudication of the facts on this charge. For that reason, there is no collateral estoppel because there was no determination of the "issue of ultimate fact," *cf. Ashe* v. *Swenson,* 397 U.S. 436, 25 L. Ed. 469, 90 S. Ct. 1189 (1970).

Petitioner Green's statement that the State of Ohio seeks "the proverbial 'second bite of the apple'," *Burks* v. *United States,* 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1977), is entirely ignorant of the proceedings herein by which he alone caused more than one trial. *Burks* stands for the prop-

osition that the Double Jeopardy Clause precludes retrial where the state has failed as a matter of law to prove its case *despite a fair opportunity* to do so. *Hudson* v. *Louisiana,* 450 U.S. —, 67 L. Ed. 2d 30, n. 5 at 34-35, 101 S. Ct. 970 (1981).

This is not such a case. Through no device of the state, but rather by deliberate choice of the defendant, the state's opportunity to prove its case on the first count of the indictment was thwarted before the trial on the second count.

The *Jeffers* decision, fully applicable here, relieves the state from a defendant's deliberate choice which causes consecutive trials on allied criminal indictments. The Ohio Court of Appeals correctly applied this Court's applicable decisions.

II. The decision below is neither in conflict with any applicable decision of this Court, nor in conflict with the decision of another state court of last resort or of a federal court of appeals.

As established above, the decision of the Ohio Court of Appeals below is entirely consistent with the applicable decisions of this Court, most notably *Jeffers* v. *United States, supra.*

Indeed, the Ohio court approaches the double jeopardy issue in much the same manner as the reasoning set forth by this Court's more recent decisions. *See Whalen* v. *United States,* 445 U.S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980); *Illinois* v. *Vitale,* 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 (1980); and *Albernaz* v. *United States,* 450 U.S. —, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981). For example, in the three cases cited, this Court's analysis

first utilizes the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions, set forth in *Blockburger* v. *United States,* 284 U.S. 299, 76 L. Ed. 306, 52 S.Ct. 180 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. 284 U.S. at 304.

In *Illinois* v. *Vitale, id.,* 447 U.S. 410, n. 6 at 416, the Court reiterated a statement that

> "[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." (Quoting from *Ianelli* v. *United States,* 420 U.S. 770, n. 17 at 785, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975).)

From the statement of the *Blockburger* test, this Court moves next to analyze the particular statutes involved. Where the case involves federal statutes, either of national application (*Albernaz*) or provisions limited to the District of Columbia (*Whalen*), this Court will interpret the legislation; where state statutes are involved, this Court respects the state court's identification of the elements of the offenses involved. *Illinois* v. *Vitale, id.,* 447 U.S. at 416; *Brown* v. *Ohio,* 432 U.S. 161, 167, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Thus, the Ohio Court of Appeals, recognizing the *Blockburger* test to be the same test long-ago established in *State* v. *Mitchell,* 42 Ohio St. 383 (1884), applied that test by authoritatively interpreting the two statutory offenses, concluding

> this court finds that the evidence necessary to sustain the conviction under R.C. 2913.02 (A) (3) is not sufficient to meet the requirements of R.C. 2913.02 (A) (2). (*See* Decision, at Petition Appendix A at 8a.)

Because the approach taken by the Ohio court below is consistent with the applicable decisions of this Court, and no allegation is made in the petition for certiorari that there is a conflict between the decision in this case and any decision of another state court or a federal court of appeals, this Court should decline to review the instant case.

CONCLUSION

Petitioner Green's application for certiorari should be denied.

Respectfully submitted,

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